



U.S. Department of Justice

Environment and Natural Resource Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

ENVIRONMENT AND NATURAL RESOURCES DIVISION

DIRECTIVE No. 2016-03

Title: Delegation of Authority to Initiate, Litigate and Compromise EDS and EES Cases

Authority: This Directive is issued pursuant to the authority vested in me as Assistant Attorney General for the Environment and Natural Resources Division (ENRD) by 28 C.F.R. §§ 0.65, 0.65a, 0.160, 0.164, 0.166 and 0.168.

Purpose: This Directive is issued in order to revise and clarify ENRD Directive No. 2014-01, which delegated authority from the Assistant Attorney General to the supervising Deputy Assistant Attorneys General (DAAGs), Chiefs, Deputy Chiefs and Assistant Chiefs of the Environmental Defense Section (EDS) and the Environmental Enforcement Section (EES) to initiate, litigate and compromise ENRD cases and take certain associated actions, as described herein. Additionally, the substance of prior ENRD Directive No. 2009-01, relating to certain counterclaims, has been consolidated into this Directive.

Relationship to Other Directives: This Directive supersedes and revokes Directive No. 2014-01 and Directive No. 2009-01. Other Division Directives relating to delegation of authority to initiate and compromise cases are: Directive No. 2016-04 (Delegation of Authority to Initiate, Litigate, and Compromise ENRD Cases); and Directive No. 1991-34 (Re-Delegation of Authority to Initiate ENRD Claims in Bankruptcy Court).

Effective Date: This Directive shall become effective upon approval by the Associate Attorney General.

Action:

I. DELEGATIONS TO THE SUPERVISING DAAGS, CHIEFS AND DEPUTY CHIEFS OF EES AND EDS

A. Authority to Initiate Cases

Subject to the limitations imposed by section III of this Directive, the supervising DAAGs, Chiefs and Deputy Chiefs of EES and EDS are each hereby authorized, with respect to matters assigned to their respective sections, to initiate civil actions on behalf of the United States in response to a specific request from an authorized official of the relevant department or

agency, as specified herein. This authority is limited to initiation of the following civil cases and/or claims:

1. Violations of the national emission standards for asbestos and benzene hazardous air pollutants brought under sections 112 and 113 of the Clean Air Act (CAA), 42 U.S.C. §§ 7412 and 7413;
2. Violations of the emergency planning, emergency notification and reporting requirements of the Emergency Planning and Community Right-To-Know Act (EPCRA) brought under section 325 of the Act, 42 U.S.C. § 11045;
3. Unlawful ocean dumping of sewage sludge, industrial waste or medical waste, under sections 104b and 105 of the Marine Protection, Research, and Sanctuaries Act (MPRSA) or to enjoin an imminent or continuing violation of subchapter I of the Act, 33 U.S.C. §§ 1414b and 1415;
4. Unlawful destruction or loss of or injury to any park system or marine sanctuary resource under section 19jj of the National Park System Resource Protection Act (NPSRPA), 16 U.S.C. § 19jj, and sections 306, 307 and 312 of the National Marine Sanctuaries Act (NMSA), 16 U.S.C. §§ 1436, 1437 and 1443;
5. Violations of any requirement of an applicable underground injection control program under section 1423 of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h-2;
6. Violations of any underground storage tank requirements of subchapter IX of section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e;
7. For penalties and/or recovery of costs incurred by the United States in connection with a discharge, or substantial threat thereof, of oil or hazardous substances into or upon the navigable waters or adjoining shorelines, or into or upon the continuous zones or exclusive economic zones, of the United States where such costs do not exceed \$5 million, exclusive of interest, under section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321, and/or sections 1002 and 1017 of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 2702 and 2717. Pursuant to these statutory provisions, this delegation of authority encompasses claims for damages to natural resources caused by such discharges;
8. For penalties, punitive damages and/or recovery of costs of removal or remedial action (including oversight costs) incurred by the United States where such costs do not exceed \$5 million, exclusive of interest, under sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9606 and 9607. Pursuant to these statutory provisions, this authority encompasses claims for damages to natural resources that result from a release of hazardous substances and caused the United States to incur response costs;

9. For relief under the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C. §§ 3001-3308, and the Federal Priority Statute (FPS), 31 U.S.C. §§ 3701-3720E, to enable the United States to preserve assets and to recover assets to satisfy judgments in actions initiated under section I.A or II.A of this Directive.
10. Violations of the duty to disclose the presence of lead-based paint and information concerning its hazards to prospective buyers and renters of residential property under section 17(a)(1) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2616(a)(1), and/or section 1018(a) of the Residential Lead-Based Paint Hazard Reduction Act (RLBPHRA), 42 U.S.C. § 4852d(a);
11. Proofs of claim or applications for allowance of administrative expenses in United States Bankruptcy Courts where such claims or applications relate to statutes enforced by EES and EDS; and,
12. Cases that the Chiefs or Deputy Chiefs of EES and EDS have the authority to compromise and that are resolved upon the simultaneous lodging of consent decrees or other settlement documents with United States District Courts.

B. Authority to Compromise Cases

Subject to the limitations imposed by section III of this Directive, the Chiefs and Deputy Chiefs of EES and EDS are each hereby authorized, with respect to matters assigned to their respective sections, to compromise the following civil cases and/or claims on behalf of the United States:

1. Those brought under the SDWA, 42 U.S.C. §§ 300f-300j-26; RCRA, 42 U.S.C. §§ 6901-6992k; the CAA, 42 U.S.C. §§ 7401-7671q; the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-467n; the CWA, 33 U.S.C. §§ 1251-1387; the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y; TSCA, 15 U.S.C. §§ 2601-2697; the OPA, 33 U.S.C. §§ 2701-2762; EPCRA, 42 U.S.C. §§ 11001-11050; the MPRSA, 33 U.S.C. §§ 1401-1445; the RLBPHRA, 42 U.S.C. §§ 4851-4856; or CERCLA, 42 U.S.C. §§ 9601-9675, where: (a) the amount of the civil penalty or punitive damages to be paid to the United States, together with the cost of any Supplemental Environmental Projects (SEPs), does not exceed \$10 million; and (b) either (i) the penalty or punitive damages (not including any SEPs) is equal to or greater than the economic benefit of non-compliance, or (ii) the settlement results from an inability-to-pay analysis, as confirmed by a qualified financial analyst;
2. Those brought under section 19jj of the NPSRPA, 16 U.S.C. § 19jj, or under sections 306, 307 and 312 of the NMSA, 16 U.S.C. §§ 1436, 1437 and 1443, for the destruction or loss of or injury to any park system or marine sanctuary resource where the estimated damages do not exceed \$10 million;
3. Those brought under section 311 of the CWA, 33 U.S.C. § 1321, and/or sections 1002 and 1017 of the OPA, 32 U.S.C. §§ 2702 and 2717, for recovery of costs incurred by the United States to remove oil or hazardous substances discharged

into or upon the navigable waters or adjoining shorelines, or into or upon the continuous zones or the exclusive economic zones, of the United States where either: (a) such costs do not exceed \$10 million, exclusive of interest, and the difference between the gross amount of the United States' claim and the proposed settlement does not exceed \$10 million; or (b) the settlement results from an inability-to-pay analysis, as confirmed by a qualified financial expert. This delegation of authority encompasses compromises of claims for damages to natural resources caused by such discharges where the estimated damages do not exceed 10 million;

4. Those brought under section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of removal or remedial action costs (including oversight costs) incurred by the United States including such compromises that include covenants not to sue under section 106 of CERCLA, 42 U.S.C. § 9606, and section 7003 of RCRA, 42 U.S.C. § 6973, where either (a) such costs do not exceed \$20 million, exclusive of interest, and the difference between the gross amount of the United States' claim and the proposed settlement does not exceed \$1 million; or (b) the settlement results from an inability-to-pay analysis, as confirmed by a qualified financial expert. This delegation of authority encompasses the compromise of claims for damages to natural resources resulting from the release of hazardous substances where such releases caused the United States to incur response costs and the estimated natural resource damages do not exceed \$10 million;
5. Those brought under section 106 of CERCLA, 42 U.S.C. § 9606, which are settled simultaneously with the filing of the complaint and call for responsible party performance of all removal and remedial action addressed by the consent decree, and where the estimated total cost of the removal or remedial action does not exceed \$10 million;
6. Those which result in settlements with *de minimis* parties under sections 106, 107 and 122(g) of CERCLA, 42 U.S.C. §§ 9606, 9607 and 9622(g); and,
7. Bankruptcy cases where the amount of funds available in the estate for payment of all unsecured claims does not exceed \$10 million, or where this delegation otherwise encompasses the necessary settlement authority.
8. Those claims under the FDCPA and FPS to enable the United States to preserve assets and to recover assets to satisfy judgments in actions initiated under sections I.A and II.A of this Directive.

C. Authority to Enforce Judicial Decrees

Subject to the limitations imposed by section III of this Directive, the supervising DAAGs, Chiefs and Deputy Chiefs of EES and EDS are each hereby authorized, with respect to matters assigned to their respective sections, to approve the filing of motions or other papers to enforce previously entered judicial decrees.

D. Authority to Approve or Disapprove Administrative Settlements

Subject to the limitations imposed by section III of this Directive, the Chief and Deputy Chiefs of EES are each hereby authorized to approve or disapprove the following administrative settlements:

1. *De minimis* settlements under CERCLA sections 106, 107 and 122(g), 42 U.S.C. §§ 9606, 9607, and 9622(g).
2. Cost recovery settlements under CERCLA section 122(h), 42 U.S.C. § 9622(h), including those settlements under CERCLA section 122(h) which include covenants not to sue under section 106 of CERCLA, 42 U.S.C. § 9606, and section 7003 of RCRA, 42 U.S.C. § 6973, where either:
 - a. The costs recovered do not exceed \$20 million, exclusive of interest, and the difference between the amount of the United States' claim and the proposed settlement does not exceed \$1 million; or,
 - b. The settlement results from an inability to pay analysis, as confirmed by a qualified financial expert.
3. Those under CERCLA sections 104 and 122, 42 U.S.C. §§ 9604 and 9622, that provide for either:
 - a. The removal of hazardous substances, pollutants or contaminants from any facility under the jurisdiction, custody, or control of any federal department or agency; or,
 - b. The conduct of any other response measure relating to the facility including any remedial investigation or feasibility study or any other site investigative work.

E. Authority to Approve Prospective Purchaser Agreements

Subject to the limitations imposed by section III of this Directive, the supervising DAAG, Chief and Deputy Chiefs of EES are each hereby authorized to approve prospective purchaser agreements, including those agreements that include covenants not to sue under section 106 of CERCLA, where the value of the United States' lien does not exceed \$250,000.

F. Authority to Compromise Stipulated Penalties

Subject to the limitations imposed by section III of this Directive the Chief and Deputy Chiefs of EES and EDS are each hereby authorized, with respect to matters assigned to their respective sections, to compromise claims for stipulated penalties under entered consent decrees, where (a) the amount of the stipulated penalty to be paid to the United States does not exceed \$1 million, and (b) the difference between the maximum amount of the potential stipulated penalty

applicable pursuant to the entered consent decree and the agreed settlement amount does not exceed \$2 million.

G. Authority to Approve Motions to Enter Consent Decrees, Execute Settlements After Public Comment, and Approve Minor Modifications to Consent Decrees

Subject to the limitations imposed by section III of this Directive, the supervising DAAGs, Chiefs and Deputy Chiefs of EES and EDS are each hereby authorized, with respect to matters assigned to their respective sections, to:

1. Approve motions to enter consent decrees and to execute or consent to a settlement agreement after public comment; and,
2. Approve any minor modification to a consent decree previously approved by the Assistant Attorney General that:
 - a. Does not require court approval pursuant to the consent decree;
 - b. Extends an interim deadline, provided that the final deadline for the requirement remains unchanged;¹
 - c. Incorporates a substitute SEP or mitigation project in situations where the original project proves unworkable and the substitute project is of the same general type as the original project; or
 - d. Substitutes a new party for a named party in the consent decree.

II. SPECIAL DELEGATIONS TO THE SUPERVISING DAAGS, CHIEFS, DEPUTY CHIEFS AND ASSISTANT CHIEFS OF EES AND EDS

A. Authority to Initiate Cases

Subject to the limitations imposed by section III of this Directive, the supervising DAAGs, Chiefs, Deputy Chiefs and Assistant Chiefs of EES and EDS are each hereby authorized, with respect to matters assigned to their respective sections, to initiate civil actions on behalf of any other department or agency in response to a written request from an authorized official of the relevant department or agency, as follows:

1. Claims under any statute enforced by the section for collection of civil penalties previously assessed by the referring agency in an administrative proceeding;
2. Claims under any statute enforced by the section to enforce requests for access to information, entry and/or inspection and samples, or to seek civil penalties for any noncompliance with such requests; and,

¹ This delegation does not affect the delegation of authority in ENRD Directive No. 2016-04, which allows supervising DAAGs, Chiefs and Deputy Chiefs to approve revisions to previously approved consent decrees or settlements that have the effect of extending agreed deadlines for no more than 12 months.

3. Claims under CERCLA sections 104, 106, 107 and 122, 42 U.S.C. §§ 9604, 9606, 9607 and 9622, to enforce administrative settlements.

B. Authority to Compromise Claims

Subject to the limitations imposed by section III of this Directive, the Chiefs, Deputy Chiefs and Assistant Chiefs of EES and EDS are each hereby authorized, with respect to matters assigned to their respective sections, to compromise civil claims on behalf of the United States, as follows:

1. Claims under any statute enforced by the respective section for collection of civil penalties previously assessed by the referring agency in an administrative proceeding or by a court where the amount of the penalty does not exceed \$2 million;
2. Claims under any statute enforced by the respective section to enforce requests for access to information, entry and/or inspection and samples, or to seek civil penalties for any noncompliance with such requests; and,
3. Claims under CERCLA sections 104, 106, 107 and 122, 42 U.S.C. §§ 9604, 9606, 9607 and 9622, to enforce an administrative settlement.

C. Authority to Approve or Deny Commencement of Administrative Proceedings Under the CAA

Subject to the limitations imposed by section III of this Directive, and upon application by the Administrator of the Environmental Protection Agency (EPA), under sections 113(d)(1) and 205(c)(1) of the CAA, 42 U.S.C. §§ 7413(d)(1) & 7524(c)(1), the supervising DAAG, Chief, Deputy Chiefs and Assistant Chiefs of EES are each hereby authorized to concur in or deny the commencement of a proceeding for the assessment of an administrative penalty greater than \$200,000 or for the assessment of an administrative penalty for an alleged violation of the CAA occurring more than 12 months prior to the initiation of the administrative action.

D. Authority to Forward Federal Register Notices to the Office of the Federal Register and to Determine Whether a Modification to a Consent Decree Requires Public Comment

Subject to the limitations imposed by section III of this Directive, the supervising DAAGs, Chiefs, Deputy Chiefs and Assistant Chiefs of EES and EDS are each hereby authorized, with respect to matters assigned to their respective sections:

1. To forward to the Office of the Federal Register all notices under 28 C.F.R. § 50.7 or any statute enforced by their respective sections; and,
2. To determine on a case-by-case basis whether a modification to a consent decree which had been previously entered after notice for public comment, or a modification to a previously-approved settlement, requires additional public comment.

E. Authority to Approve Statute of Limitations Tolling Agreements

Subject to the limitations imposed by section III of this Directive, the supervising DAAGs, Chiefs, Deputy Chiefs and Assistant Chiefs of EES and EDS are each hereby authorized, with respect to matters assigned to their respective sections, to approve statute of limitations tolling agreements, and any extensions of such agreements, when such agreements are in the best interests of the United States.

F. Redlegation of Authority to File Counterclaims in Certain ENRD Cases Arising Under CERCLA and/or RCRA

Subject to the limitations imposed by this section II.F., the Section Chiefs and Deputy Section Chiefs of EDS and EES are each hereby authorized, with respect to matters assigned to their respective sections, to file counterclaims on behalf of any department or agency in response to a specific request from an authorized official of the department or agency concerned, in cases in which claims are asserted against the United States pursuant to sections 107(a) or 113(f) of CERCLA, 42 U.S.C. §§ 9607(a) or 9613(f), and/or section 7002(a) of RCRA, 42 U.S.C. § 6972(a), as a potentially responsible party (PRP) or a contributor to an imminent and substantial endangerment. In such cases, where the United States is potentially exposed to liability in excess of its equitable share, the Section Chiefs and Deputy Section Chiefs of EDS and EES are each hereby authorized, with respect to matters assigned to their respective sections, to approve the filing of counterclaims under section 113(f) of CERCLA, 42 U.S.C. § 9613(f), or Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), in the nature of contribution; section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 7002(a)(1)(B); or other counterclaims as otherwise necessary in order to render the claim against the United States a claim for equitable allocation of response costs or for equitable allocation of the obligation to abate the endangerment. The section filing the counterclaim shall provide the other section advance notice of the filing.

The authority to file counterclaims redelegated as described in the paragraph above does not include authority to file third party claims against entities who have not asserted claims against federal agencies.

III. LIMITATIONS ON DELEGATIONS

The authority described in sections I and II above may not be exercised, and the matter shall be submitted for resolution to the Assistant Attorney General, in any of the following situations:

- A. In accordance with 28 C.F.R. § 0.160(a)(1), the difference between the gross amount of the original claim and the proposed settlement exceeds \$10 million or 15% of the original claim, whichever is greater. In such circumstances, approval must be obtained from the Associate Attorney General. Regardless of the amount of the proposed settlement, however, in accordance with 28 C.F.R. § 0.160(c) the Assistant Attorney General may approve certain CERCLA settlements with *de minimis* parties or those whose responsibility can be equitably allocated and either are paying at least their allocated amount or lack the ability to pay.

- B. For any reason, the proposed action, as a practical matter, will control or adversely influence the disposition of other claims totaling more than the respective amounts designated in the above sections or exceeding the authority to accept offers in compromise delegated to the Assistant Attorney General by 28 C.F.R. § 0.160(a).
- C. The proposed settlement commits a federal department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.
- D. The proposed settlement converts into a mandatory duty an otherwise discretionary authority of a federal department or agency to promulgate, revise, or rescind regulations.
- E. The proposed settlement otherwise limits the discretion of a federal department or agency to make policy or managerial decisions committed to such department or agency by Congress or the Constitution.
- F. Because a novel question of law or a question of policy is presented or, for any other reason, the proposed action should, in the opinion of the respective DAAG, Chief, Deputy Chief or Assistant Chief, receive the personal attention of the Assistant Attorney General.
- G. An agency involved is opposed to the proposed compromise of a claim.
- H. Sections within ENRD do not concur as to the proposed action.

The authority delegated herein may not be re-delegated without prior written approval by the Assistant Attorney General.


IV. REVOCATION OF DIRECTIVE NO. 2013-01 AND DIRECTIVE NO. 2009-01

Environment and Natural Resources Division Directive No. 2013-01 and Environment and Natural Resources Division Directive No. 2009-01 are hereby revoked and replaced by this Directive.

Consultation and Distribution:

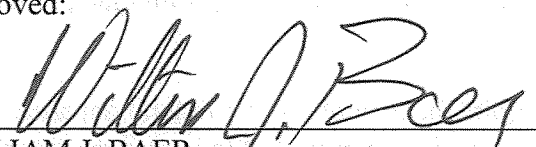
This Directive was developed in consultation with DAAGs Lisa Jones and Bruce S. Gelber, LPS, and the Chiefs, Deputy Chiefs and Assistant Chiefs for EDS and EES. I hereby instruct LPS to distribute this Directive to all sections and the Executive Office to make a copy of the original available to all Division attorneys and other employees via user-friendly software technology such that it is indexed, searchable and accessible. I further direct LPS to notify the Executive Office for United States Attorneys of the need for appropriate changes to the United States Attorney's Manual.

This Directive relates only to internal procedures and management of ENRD. It does not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, officers, or any other person.


JOHN C. CRUDEN
Assistant Attorney General

11/29/2016
DATE

Approved:


WILLIAM J. BAER
Principal Deputy Associate Attorney General

12/20/16
DATE